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THE THEORY OF THE PLEADING. — Under the common-law system of pleading it is impossible to begin proceedings under one form of action, and then recover on proof of facts sufficient to maintain another form.[1] The manifest injustice resulting is only in part relieved by the device of amendment, since this is limited by the general rule that amendments cannot introduce a new cause of action.[2] Under that system the plaintiff stated, not the facts of the transaction from which the rights and duties of the parties arose, but what he conceived the legal effect of those facts to be; and if a mistake occurred in his conclusions, then unless permitted to amend he was thrown out of court and compelled to begin anew.[3]

To this was due in part the widespread adoption of codes; but the hostility and illiberality of the judiciary in construing and applying their provisions have led in many jurisdictions to a state of confusion and technicality unknown even at common law.[4] Under the codes the forms of action are abolished and the pleader is required to make only a "plain and concise statement of facts constituting each cause of action." [5] It is well settled that this in no way affects the fundamental rights and liabilities created by the law and the principles by which they are determined, nor alters the remedies afforded litigants.[6] But in contravention of the avowed purpose of the legislature some courts

[1] Savignac *v.* Roome, 6 T. R. 125, 129.
[2] Steffy *v.* Carpenter, 37 Pa. St. 41.
[3] For a glaring example of this, see Allen *v.* Tuscarora Valley R. Co., 78 Atl. 34 (Pa.).
[4] See 22 Green Bag, 438, 440.
[5] N. Y. CODE CIV. PROC., §§ 481, 3339.
[6] See POMEROY, CODE REMEDIES, 3 ed., §§ 67–81.

have evolved a doctrine of the "theory of the pleading" best stated as follows: "It is an established rule of pleading that a complaint must proceed upon some definite theory; and on that theory the plaintiff must succeed or not succeed at all. A complaint cannot be made elastic so as to take form with the varying views of counsel." [7] The application of this rule prevents not only a change from a legal to an equitable theory or *vice versâ*, but also, in some jurisdictions, a change of theory at law or in equity.[8] This doctrine is firmly established in Indiana [9] and Missouri,[10] but in many other jurisdictions the decisions are hopelessly confused.[11]

Logically, if the plaintiff has set forth facts in his complaint constituting a cause of action and entitling him to some relief legal or equitable, his action should not be dismissed because he has misconceived the nature of his remedial right.[12] And the decisions are tending strongly to that view, Wisconsin, especially, having abandoned its former position.[13] In a recent case the court permitted amendment of a complaint setting forth a cause of action for negligence so as to allow recovery under a statute. *Birt* v. *Southern R. Co.*, 69 S. E. 233 (S. C.). The argument advanced by advocates of the doctrine is based on the danger of surprise to the defense, but clearly no undue burden is imposed upon a party by compelling him to come into court prepared to defend on any possible legal view of the facts. On the other hand, it is the height of technicality to compel one, admittedly entitled to some relief, to begin his proceedings anew because of the failure of his counsel to select the proper theory.[14] The chief purpose of the pleadings is to notify the parties of the claims or defenses which will be advanced by their opponents, and that result being accomplished by a complete statement of the facts, they should not afford a means of escape from just liability.[15] The practicability of the rule contended for is shown by its success in the jurisdictions adopting it, and also by the satisfaction with the practice in some states whereby claims against decedents' estates are litigated with no other pleadings than an informal statement of claim in which no attempt is made to set forth a cause of action.

GIFTS INTER VIVOS OF CHOSES IN ACTION REPRESENTED BY A SPECIALTY. — Although in Coke's time a donee of a chose in action ac-

[7] Mescall *v.* Tully, 91 Ind. 96, 99.

[8] The theory of a case does not involve the amount of relief. Hence there is no departure from the theory when one obtains less relief than was asked for, Yorn *v.* Bracken, 153 Ind. 492; nor is it necessarily a departure when the relief to which one is entitled differs slightly from that asked, Matthias *v.* Warrington, 89 Va. 533.

[9] Oölitic Stone Co. *v.* Ridge, 83 N. E. 246, 247 (Ind.).

[10] Huston *v.* Tyler, 140 Mo. 252.

[11] See 8 Col. L. Rev. 523, 532, 533 and cases cited.

[12] White *v.* Lyons, 42 Cal. 279, 282. See Manning *v.* School District, 124 Wis. 84, 91.

[13] Manning *v.* School District, *supra;* Bieri *v.* Fonger, 139 Wis. 150; Bannen *v.* Kindling, 142 Wis. 613, overruling Supervisors *v.* Decker, 30 Wis. 624; Grimes *v.* Greenblatt, 47 Colo. 495; Cockrell *v.* Henderson, 81 Kan. 335; Crowder *v.* Fordyce Lumber Co., 93 Ark. 392; Bates *v.* Capital State Bank, 18 Idaho, 429. *Contra*, Jones *v.* Winsor, 22 S. D. 480.

[14] See Bieri *v.* Fonger, *supra.*

[15] See 4 Ill. L. Rev., 491, 494.